IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-834

FRANKLIN PEROFF,

Petitioner,

v.

I. G. HYLTON, UNITED STATES MARSHAL,

AND

EDWARD LEVI, ATTORNEY GENERAL OF THE UNITED STATES,

AND

HENRY KISSINGER, SECRETARY OF STATE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PHILIP J. HIRSCHKOP, ESQ.
108 North Columbus Street
Post Office Box 1226
Alexandria, Virginia 22313
(703) 638-6595

AARON R. FODIMAN, ESQ.
1830 North Nash Street
Arlington, Virginia 22209
(703) 525-1101
Attorneys in Support of Petitioner.

Washington, D.C. • THIEL PRESS • (202) 638-4521

TABLE OF CONTENTS

TABLE OF CITATIONS

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No.

FRANKLIN PEROFF,
Petitioner,

v.

I. G. HYLTON, UNITED STATES MARSHAL,

AND

EDWARD LEVI, ATTORNEY GENERAL OF THE UNITED STATES,

AND

HENRY KISSINGER, SECRETARY OF STATE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioner, Franklin Peroff, respectfully prays for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit to reverse its decision affirming the Judgment of the United States District Court for the Eastern District of Virginia, Alexandria Division.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Fourth Circuit is as yet unreported but it is appended

hereto (see, Appendix, page 1-A). The Order of the District Court dismissing the petition for writ of habeas corpus was entered March 22, 1976, and is appended hereto. (see, Appendix, page 5-A).

JURISDICTIONAL STATEMENT

On March 22, 1976, the United States District Court for the Eastern District of Virginia, Alexandria Division, in *Franklin Peroff v. I. G. Hylton, et al.*, Civil Action No. 76-204-AM, entered an Order dismissing petitioner's petition for Writ of Habeas Corpus. The Judgment of the United States Court of Appeals for the Fourth Circuit, affirming said dismissal was entered on October 21, 1976, in *Franklin Peroff v. I. G. Hylton, et al.*, Civil Action No. 76-1562. On November 10, 1976, a Petition for Rehearing was filed in the Court of Appeals, petitioner having requested and been granted an extension of time within which to file same. The petition for rehearing was denied by Order entered November 18, 1976. This petition is timely filed. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254. Jurisdiction of the District Court was under 28 U.S.C. §2255, and that of the Extradition Court pursuant to 18 U.S.C. §3184.

QUESTIONS PRESENTED

I. THE COURT'S OPINION OVERLOOKS SPECIFIC TREATY PROVISIONS AND IGNORES THE FACT PETITIONER WAS NOT AFFORDED AN EVIDENTIARY HEARING WITH REGARD TO A PROTECTIVE AGREEMENT AND THE GOVERNMENT'S BAD FAITH MOTIVE.

II. THE COURT ERRED IN HOLDING THAT HUMANITARIAN CLAIMS ARE NOT COGNIZABLE IN EXTRADITION PROCEEDINGS AND IN NOT AFFORDING PETITIONER AN OPPORTUNITY TO PRESENT EVIDENCE THEREON.

III. THE COURT INCORRECTLY HELD THAT THE IDENTITY OF THE ACCUSED WAS SUFFICIENTLY ESTABLISHED BY THE EVIDENCE AND APPLIED AN INCORRECT STANDARD OF PROOF IN DETERMINING SAME.

IV. THE EVIDENCE DOES NOT WARRANT A FINDING OF PROBABLE CAUSE.

STATUTORY PROVISIONS INVOLVED

The United States-Sweden Extradition Treaty, 14 U.S.T. 1845 provides in pertinent part:

Article V

Extradition shall not be granted in any of the following circumstances:

* * *

6. If in the specific case it is found to be obviously incompatable with the requirements of humane treatment, because of, for example, the youth or health of the person sought, taking into account also the nature of the offense and the interests of the requesting state.

* * *

Article VII

There is no obligation upon the requested state to grant the extradition of a person who is a national of the requested state, but the executive authority of the requested state shall, subject to the appropriate laws of that state, have the power to surrender a national of that state if, in its discretion, it be deemed proper to do so.

* * *

Article XI

* * *

2. The documents specified in this Article must include a precise statement of the criminal act with which the person sought is charged or of which he has been convicted, and the place and date of the commission of the criminal act. The said documents must be accompanied by an authenticated copy of the texts of the applicable laws of the requesting State including the laws relating to the limitation of the legal proceedings or the enforcement of the penalty for the offense for which the extradiction of the person is sought, and data or records which will prove the identity of the person sought as well as information as to his nationality and residence.

* * *

Article XII

1. The Contracting States may request, through the diplomatic channel, the provisional arrest of a person, provided that the offense for which he is sought is one for which extradition shall be granted under this Convention. The request shall contain:

   (a) A statement of the offense with which the person sought is charged or of which he has been convicted;

   (b) A description of the person sought for the purpose of identification;

   (c) A statement of his whereabouts, if known; and

   (d) A declaration that there exist and will be forthcoming the relevant documents required by Article XI of this Convention.

* * *

Article XV

To the extent consistent with the stipulations of this convention and with respect to matters not covered herein, extradition shall be governed by the laws and regulations of the requested state.

STATEMENT OF THE CASE

Based almost entirely on the testimony of one individual, a Swedish ex-bank manager now convicted of Swedish currency violations and a fugitive from Sweden, the government of Sweden has sought Franklin Peroff's extradition to stand trial on two charges of "gross fraud" under that nation's laws. Apparently, Sweden initiated the extradition machinery as early as July 3, 1974, and perhaps earlier, by requesting information concerning petitioner's location, identity, and whether judicial proceedings had been undertaken against him regarding certain stock shares. The Department of Justice, as well as other executive departments were well aware of Sweden's inquiries. Three weeks after the inquiry, and the day after investigation pursuant to Sweden's request was terminated, the United States, represented by Justice Department officials, entered into an agreement with petitioner obligating this government to "preserve secret" the new name and location of petitioner and his family "and take appropriate steps in the performance of the agreement to insure such secrecy.[1] The United States again either failed or refused to release such information

---

[1] At the extradition hearing, petitioner also testified that the United States government was aware of the Swedish transactions before the agreement was executed. Evidence to corroborate same was not available to petitioner until the government in its reply brief in the Court of Appeals supplied an F.B.I. Memorandum dated February 11, 1976, referring to Sweden's July 3, 1974, request.

pursuant to a later request. After petitioner threatened legal proceedings against the United States regarding other aspects of the agreement he was arrested and held pursuant to a formal extradition request.

On February 19, 1976, petitioner was arrested pursuant to a surrender warrant issued as a result of an extradition request by Swedish authorities. On February 23 and 24, 1976, an extradition hearing was held, after which Judge J. Calvitt Clarke, Jr., certified petitioner extraditable to Sweden.[2]

Said certification was based on extradition documents submitted by the government pursuant to Title 18 U.S.C. §3190 and was made after both petitioner and his wife testified. Virtually all the documentary evidence was obtained in proceedings against three Swedish citizens for violations of that country's currency laws, including the aforementioned Swedish bank manager, Bengt Mattsson.

Petitioner is charged with "gross fraud" on two occasions—on June 5, 1972 and in August, 1972—both offenses alleged to have occurred in Sweden. Virtually the only evidence on which said charges, the probable cause finding and the identity of petitioner were based, is the unsworn testimony of Mattsson.

Mattsson arranged loans totaling approximately $200,000.00 using as collateral American stock certificates, which he alleged were represented to him by an American named Peroff to be of value but which later allegedly turned out to be worthless. Despite Mattsson's claims of handing over this money to the American in the normal course of business, he never obtained any receipt, note or writing of any kind from Peroff. Despite at least six other persons having been involved in the two

[2]Jurisdiction was conferred by 18 U.S.C. §3184.

transactions, only Mattsson had identified Peroff as perpetrating a fraud. Despite having possession of supposedly valuable stock, Mattsson secured two lenders with his own personal notes. Despite finding out about the stock's worthless value, he accepted "replacement" shares from the valueless company's director, one Francis P. O'Neill, and entered into a business agreement with O'Neill, the man Sweden alleges initiated the fraud. Despite almost three years of legal proceedings against him, Mattsson was never able to corroborate meeting or handing over any money to the American named Peroff.

Similarly, the only evidence identifying petitioner as the person involved in the particular crimes alleged is a statement Mattsson gave to a Swedish investigator, over the telephone, five months after his own conviction of Swedish currency law violations to the effect that he had written down Peroff's passport number some two and one half years before. But Mattsson never gave any description of this Peroff and in fact spelled his name differently from the petitioner's passport.[3]

Thereafter, on March 17, 1976, a Petition for Writ of Habeas Corpus was filed in the United States District Court for the Eastern District of Virginia, Alexandria Division,[4] alleging, *inter alia*, that the initial probable cause determination was in error; that the Court employed an incorrect standard with regard to the requisite proof of identification needed to be established by the government in extradition proceedings; that the Court should have considered and ruled favorably on appellant's

[3]In fact, the name of the person Mattsson claimed to have referred to was one 'Franklyn Peroff'. Petitioner's first name is spelled 'Franklin.'

[4]Jurisdiction was conferred by 28 U.S.C. §2255.

claim that the government should be estopped from seeking the extradition order because of a "witness protection" contract entered into by him and the United States and because of the government's bad faith in proceeding against him; and that the Court should have found extradition improper pursuant to Article V, paragraph 6 of the applicable American-Swedish Extradition Treaty, (*supra*, p. 3) providing that extradition shall not be granted if incompatible with humane treatment.

Simultaneous with the filing of the habeas petition in the District Court, petitioner requested a stay of extradition pending determination of the petition. A District Court Judge entered on Order staying the issuance of the warrant or staying execution of same were it already signed by the Secretary of State for a period of less than a week until the judge who signed the extradition Order would be back in Alexandria. At that time Judge Clarke would, counsel was informed, be sitting in Alexandria to *further consider the issuance of a stay pending determination of the merits of the petition for a writ of habeas corpus.*

Consequently, because the argument on the stay was set down on such short notice and because of scheduling conflicts, an associate of counsel appeared on behalf of petitioner and proceeded to argue the issue of the stay. Contrary to the notice given, the District Court proceeded to determine the habeas petition on its merits. Contrary to the Order of the District Court of March 22, 1976, stating that counsel in effect attempted to secure a continuance (see Appendix, page 5-A), no continuance was necessary as the stay and setting a hearing date were the only issues before the Court that day.

That Order further indicates that the evidence presented did not address the issues raised in the habeas

petition. Indeed, neither counsel nor petitioner were prepared, for the reasons stated heretofore, to present such evidence that day—evidence which the Court itself stated should have been presented at a hearing on the merits. Over the objection of counsel, the Court denied said Petition without affording an opportunity for a hearing or the introduction of evidence.

On October 21, 1976, the United States Court of Appeals for the Fourth Circuit affirmed the dismissal, finding that the extradition hearing established probable cause to believe that an offense was committed, that Sweden has a substantial basis for proceeding against petitioner and that it is the petitioner whom Sweden seeks for trial. Significantly, with regard to the contract, urged by petitioner as barring his extradition, the Court stated: "If such an agreement could ever justify noncompliance with solemn treaty obligations, however, this one does not" (See, Appendix, page 3-A), finding the purpose and scope of the agreement limited to protecting petitioner from underworld assassins, despite the fact petitioner was never given the opportunity to present evidence thereon at the habeas corpus hearing. In fact, the only[5] evidence presented regarding the agreement was in the form of affidavits and memoranda appended to the government's reply brief in the Court of Appeals,

---

[5]The protective agreement in question was not introduced into evidence at either the extradition hearing or the hearing of March 22, 1976. It was, however, introduced into evidence at a hearing on petitioner's Motion for Bond pending appeal on April 2, 1976, before District Court Judge D. Dortch Warriner. At that time, the government asserted that the agreement had lapsed. The Court, although noting that the question of the continuing existence of the agreement was not before it at that hearing, stated it saw "nothing in here to provide for a lapse."

which petitioner was unable to rebut, thereby converting the appellate proceeding to an ex parte trial proceeding.

The Appellate Court further held that petitioner was properly denied the opportunity to present evidence related to the 'protective agreement' and the risks he would encounter were he to be actually delivered to Swedish authorities stating there was no "reason to suppose" Sweden could not do what is required of it to assure petitioner's safety and further holding denial of extradition on 'humanitarian grounds' within the purview of the Executive, not the Judiciary. With regard to petitioner's claim of bad faith prosecution, the Court was silent.

REASONS FOR GRANTING THE WRIT

The fundamental question in this case is one of due process, that is, whether petitioner should have been afforded an opportunity by way of habeas corpus, to present evidence relating to the protective agreement, negotiations regarding same, and the government's bad faith in proceeding against him in contesting his attempted extradition to Sweden. In denying that opportunity, the United States Court of Appeals for the Fourth Circuit has sanctioned that extradition proceedings take place not in accordance with but in ignorance of this nation's laws. The holding of the Court insofar as it relates to the jurisdiction of the judiciary to consider humanitarian claims pursuant to specific treaty stipulations is in conflict with the position of other Circuit Courts of Appeal that treat claims under comparable provisions in other treaties of extradition as being cognizable in habeas corpus proceedings. Additionally, serious questions are involved as to the requisite proof of identity needed to be established in extradition proceedings and whether, in the instant case, the government met the burden of proof cast upon it to prove both petitioner's identity and probable cause to believe a crime was committed.

I.

THE COURT'S OPINION OVERLOOKS SPECIFIC TREATY PROVISIONS AND IGNORES THE FACT PETITIONER WAS NOT AFFORDED AN EVIDENTIARY HEARING WITH REGARD TO A PROTECTIVE AGREEMENT AND THE GOVERNMENT'S BAD FAITH MOTIVE.

The opinion affirming the action of the District Court states:

> . . . Peroff claims this [protective] agreement bars his extradition to Sweden. If such an agreement could ever justify noncompliance with solemn treaty obligations, however, this one does not. It was designed to give Peroff protection from underworld assassins and not to protect him from otherwise legal and proper prosecutorial measures . . . the district judge properly found no bar in the witness protection agreement to his extradition."
> (See, Appendix, page 3-A)

In so holding, this Court (a) overlooked treaty provisions limiting each country's obligations in extradition matters, and (b) made a factual determination without petitioner having been afforded the opportunity to present any evidence about the agreement in the Court below. The obligations of the United States to surrender a citizen upon the request of a foreign government is, in fact, limited. It is a fundamental element of our Constitutional system that an executive officer has no inherent powers to order the extradition of United States citizens. *Valentine v. United States, ex. rel. Neidecker,* 299 U.S. 5(1936). Moreover, international law recognizes no such

right apart from an existing treaty. *Factor v. Laubenheimer*, 290 U.S. 276 (1933). As stated in *Valentine, supra:*

> The Constitution creates no executive perogative to dispose of the liberty of an individual . . . there is no discretion to surrender [a United States citizen] to a foreign government, unless that discretion is created in law. *It is not enough that statute or treaty does not deny the power to surrender. It must be found that statute or treaty confers the power.* (emphasis supplied)

As the power of extradition is purely a creature of statute, one must look to the treaty to determine the parameters of that power. The relevant treaty, in turn, specifically provides:

> To the extent consistent with the stipulations of this Convention and with respect to matters not covered herein, *extradition shall be governed by the laws of the requested state.*
>
> Article XV, 14 U.S.T. 1845 (emphasis supplied) (*supra* p. 5)

Under a correct interpretation of the treaty obligations and under the laws of the United States, the government's duty with regard to the protective agreement bar its attempt to seek petitioner's extradition—the United States simply cannot lawfully pick and choose which agreements it enters into to unilaterally abrogate.

Petitioner, however, has not relied upon the protective agreement alone. Given the opportunity, petitioner would have shown that the United States was well aware of the prospects of a Swedish extradition request but still chose to enter into the protective agreement. Petitioner would also have attempted to show that although initially complying with its agreement to preserve his identity by refusing to provide Swedish authorities with petitioner's

location and identity and other extradition related information, a conscious decision was later made by government officials to rid themselves of Mr. Peroff by using the extradition matter. The government's bad faith prosecution of an extradition matter is no less objectionable than bad faith domestic criminal prosecutions which run afoul of an individual's due process rights. The treaty in question by its own terms makes clear that extradition proceedings must be consistent with the "laws of the requested state" and the laws of the United States zealously guard against such bad faith prosecutions.[6] Petitioner merely asks this Court to allow him the opportunity to show this is what occurred in this case.

With regard to the protective agreement itself, the opinion does not state that such an agreement could never stand as a bar to extradition, but states instead ". . . this one does not." Again, petitioner sought in the District Court to substantiate his position but was denied that opportunity. In this regard, the Appeals Court's holding simply overlooks that fact, and has to be based on unrebutted affidavits submitted by the government in the Court of Appeals level. This Court should not encourage ex parte evidentiary hearings at the Court of Appeals level, especially which petitioner has had no chance to rebut.

Apparently, the Court not only gave evidentiary weight to the government's reply brief affidavits and factual memoranda—an action that is insupportable in law—but also chose to determine a factual issue adversely

---

[6]Moreover, were the treaty to purport to deny an American citizen specific Constitutional protections, such provisions would be of doubtful validity. *Geisser v. United States*, 513 F.2d 862 (5th Cir. 1975); *Reid v. Covert*, 354 U.S. 1 (1957).

to petitioner with no evidence on the issue having been introduced at any stage in the proceedings.

II.

THE COURT ERRED IN HOLDING THAT HUMANITARIAN CLAIMS ARE NOT COGNIZABLE IN EXTRADITION PROCEEDINGS AND IN NOT AFFORDING PETITIONER AN OPPORTUNITY TO PRESENT EVIDENCE THEREON.

Article V, paragraph 6, of the Swedish-American Extradition Treaty, 14 U.S.T. 1845, clearly provides, *inter alia,* that extradition "*shall* not be granted . . . [i]f in the specific case it is found to be obviously incompatible with the requirements of humane treatment." Although this provision is mandatory in nature and other Courts have consistently determined claims enumerated in other treaties of extradition with provisions comparable to Article V, *Jhirad v. Farrandina,* 536 F.2d 478 (2nd Cir. 1976); *Merino v. United States Marshall,* 326 F.2d 5 (9th Cir. 1963); *In Re Extradition of Gonzales,* 217 F. Supp. 717 (S.D.N.Y. 1963), nevertheless the Court below, despite stating that the Executive branch of the government may deny extradition on this ground, held that the judiciary cannot.

This Court should define the role of the judiciary in extradition proceedings, to resolve the apparent conflict between the position of the Court below and that of the above cited Courts, and to reach a consistent application of treaties of extradition in proceedings in the various Circuits.

The Appellate Court overlooked the fact that petitioner was denied the opportunity to present evidence on the continuing jeopardy to his life and on the danger to

which he would be subjected were he extradited to Sweden.[7]

Extradition proceedings should not be allowed to become merely salutory in nature. A citizen's Constitutional rights must be considered in these proceedings. Before a citizen is wisked away from his family and his nation the laws of the United States still apply and the individual is still entitled to its protections. Importantly, the extradition treaty we deal with here does not deny these entitlements, and quite to the contrary, mandates that extradition be consistent with the laws of the requested state[8], but the District Court and the Court of Appeals have interpreted and applied the treaty in such a manner that accomplishes the opposite result.

---

[7]By virtue of the protective agreement, the United States has admitted that the danger to Peroff's life is substantial and real. The opinion, however, indicates that there was no showing Sweden would not be able to protect Peroff. Again, it must be pointed out the District Court foreclosed any opportunity to present evidence by its summary dismissal, which action was affirmed by the Court of Appeals.

[8]Interestingly, Swedish law provides that Swedish citizens *cannot* be extradited to a foreign country to stand trial notwithstanding the American-Sweden Extradition Treaty. Swedish Statute of December 6, 1957, on Extradition. Original text: *Svensk Författningssamling* 1957:688. See also *Sveriges Rikas Lag* 765. Since a Swedish statute overrides a "solemn treaty obligation" it is unusual indeed that neither a contract with the United States nor the United States Constitution does not.

III.

THE COURT INCORRECTLY HELD THAT THE IDENTITY OF THE ACCUSED WAS SUFFICIENTLY ESTABLISHED BY THE EVIDENCE AND APPLIED AN INCORRECT STANDARD OF PROOF IN DETERMINING SAME.

A substantial question was raised in the extradition hearing that the government failed to meet its burden of proving the appellant is, in fact, the person who allegedly handed over the shares of stock to Bengt Mattsson.

Mattsson's testimony is the only testimony tying anyone named Peroff into the alleged transactions. In essence, the government's evidence shows only that *Mattsson* claimed the man named Peroff made misrepresentations. *Mattsson* claimed a man named Peroff was given the money and that *Mattsson* claimed a man named Peroff handed over the stock shares. Appellant, in turn, disputed the fact he was in Sweden on June 5, 1972, the date of the alleged initial transaction.

In an attempt to establish identity, the government basically relied on Mattsson's statements while Mattsson himself was being investigated for gross violations of Swedish currency laws. The government additionally produced a statement by Mattsson made two and one-half years after the fact that he had copied down the American's passport number. During his own trial, Mattsson, curiously, was unable to introduce any evidence to corroborate his claim that money was handed over to Peroff, or that he ever met with a man named Peroff. The government further produced evidence that a Frank Peroff was registered at a hotel in Sweden on May 18, 1972—a date which is totally irrelevant to any transactions mentioned in the Swedish documents. The government additionally relied on signed stock transfer and share certificates. Not only are the certificates

unwitnessed but Mattsson's testimony shows that same were signed *before* the June 5, 1972 transaction—the first time he claimed he saw them.

No physical description of the American involved in the transaction was produced nor is any photograph of that person identified as *the* person supposedly involved. Although appellant concedes that the passport documents supplied by the Department of State belong to him, there is absolutely no evidence showing that anyone, including Mattsson, checked the passport to verify the identity of the person who was asking for sizeable loans. Indeed the Swedish documents spell the Swedish Peroff's first name differently from petitioner's.

Petitioner would submit this evidence fails to establish even probable cause to believe that the American allegedly involved is the person now sought to be extradited to Sweden.

Probable cause, however, is not the standard of proof that must be met on the question of identity in extradition proceedings. Rather, the evidence must establish that the person sought is, in fact, the person charged with the offenses alleged.

This notion of strict proof of identity is not new as this has long been held to be the case in interstate extraditions, *See, e.g., Myers v. Allen,* 83 Fla. 655, 92 So. 155 (1922); *James v. Lynch,* 16 Ill. 2d 380, 158 N.E.2d 60 (1959), *Re Baker,* 310 Mass. 724, 39 N.E.2d 762 (1942) and is applied as well in international proceedings. *See, Glucksman v. Henkel,* 221 U.S. 508 (1911) *Argento v. Horn,* 241 F.2d 258 (6th Cir. 1957).

Furthermore, Article XI of the Swedish extradition treaty, 14 U.S.T. 1845, itself provides that documentation supplied by the requesting country *must* include data or

records which will *prove* the identity of the accused. (*supra,* page 4) Even in terms of *emergency* detention, Article XII, paragraph 1 (b) of the treaty requires a physical description of the person sought must be forwarded for identification purposes. (*supra,* page 4). It would be a highly doubtful construction of the treaty that would result in a higher standard of proof of identity for detention of an accused within the requested state than for actual extradition to a foreign country.

IV.

THE EVIDENCE DOES NOT WARRANT A FINDING OF PROBABLE CAUSE

As stated in the Statement of the Case, *supra,* the only evidence relating to anyone named Peroff being involved in the alleged false representations was that supplied by Mattsson while he himself was being proceeded against for violations of Sweden's currency laws. Basically, the evidence shows Mattsson attempted to set up as a defense that a Franklin Peroff was responsible for setting up the loans in question, misrepresenting the value of stock in the process, and that he, himself, was an unwilling victim of the alleged scheme. In that, he failed. Mattsson was unable to show that he ever met or handed over any money to anyone, much less an American named Peroff. Despite the fact that at least six other persons were involved in the two transactions, no one besides Mattsson ever claimed to have met "Peroff" or knew that name. Despite his banking experience and stated belief he was acting in the interest of the bank he managed, he never obtained any receipts, notes or documentation of any kind for any money he allegedly transferred to Peroff. Despite obviously being knowledgeable about secured loan transactions, Mattsson claimed he was misled as to

the value of the stock in question although the true name of the company appears thereon and various stock exchanges were contacted to determine the value of the stock. With regard to the August transaction, despite holding supposedly valuable stock shares Mattsson secured loans with personal notes on his home.

After the loans fell due, and after he allegedly discovered the stock to be worthless, the evidence further shows that Mattsson (a) contacted one Francis O'Neil, whom Sweden has alleged was the initiator of the fraudulent scheme, and director of the company, that issued the worthless stock; (b) admitted taking exchange shares for those he originally received; and (c) entered into a business contract with O'Neil.[9]

In habeas corpus proceedings, the scope of review with regard to probable cause determinations includes whether there exists competent evidence of criminality in the record "warranting the finding that there was reasonable ground to believe the accused guilty." *Shapiro v. Ferrandina,* 478 F.2d 894, 900 (2nd Cir., 1972); *Merino v. United States Marshal,* 326 F.2d 5 (9th Cir. 1963); *Garcia-Guillern v. United States,* 450 F.2d 1189 (5th Cir. 1971), *cert. den.,* 405 U.S. 989; *Fernandez v. Phillips,* 268 U.S. 311 (1925).

It is submitted that the evidence fails to rise to this standard.

---

[9]Additionally, petitioner testified at the extradition hearing that he was informed by government officials that Mattsson, now a fugitive from Sweden, is now in the hotel business, with O'Neill, in Gambia. As seen from the extradition documents, Sweden has no case against Peroff without Mattsson, who is not only a fugitive from Sweden, but in a country from which he cannot be extradited as would have been shown in a proper habeas corpus proceeding had it been afforded petitioner.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the Judgment and Opinion of the Fourth Circuit Court of Appeals.

Respectfully submitted,

PHILIP J. HIRSCHKOP, ESQ.
108 North Columbus Street
Post Office Box 1226
Alexandria, Virginia 22313
(703) 638-6595

AARON R. FODIMAN, ESQ.
1830 North Nash Street
Arlington, Virginia 22209
(703) 525-1101
Attorneys in Support of Petitioner.

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 76-1562

Franklyn Peroff,

Appellant,

versus

I. G. Hylton, United States Marshal, Edward Levi, Attorney General of the United States; and Henry Kissinger, Secretary of State,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. J. Calvitt Clarke, Jr., District Judge.

Argued September 13, 1976 – Decided October 21, 1976.

Before HAYNSWORTH, Chief Judge, WINTER and BUTZNER, Circuit Judges

HAYNSWORTH, Chief Judge:

By a petition for writ of habeas corpus Franklyn Peroff sought judicial review of an order authorizing his

extradition to Sweden. The petition was denied, and we conclude that its denial was proper.

The defendants, a United States marshal, the Attorney General of the United States and the Secretary of State question our jurisdiction because a surrender warrant has been delivered to the Swedish Ambassador to the United States. This occurred during the pendency of this appeal, but there has been no attempt by Swedish officials to obtain actual physical custody of Peroff. He is at large on bail, but within the technical custody of the marshal. Should we conclude that he was not properly extradited, the court could accomplish his unconditional release by an order directed to the marshal, and that power suffices to meet the jurisdictional requirement.

The extradition hearing is not designed as a full trial. The purpose is to inquire into the presence of probable cause to believe that there has been a violation of one or more of the criminal laws of the extraditing country, that the alleged conduct, if committed in the United States, would have been a violation of our criminal law, and that the extradited individual is the one sought by the foreign nation for trial on the charge of violation of its criminal laws. Those requirements were amply met in the hearing. A former banker in Sweden testified about the negotiation of securities, which later turned out to be worthless, in exchange for substantial sums of money in Sweden, and that the fraud was perpetrated by Franklyn Peroff. Peroff acknowledges that the stock certificates bear his endorsement, but he claims defensively that he had received the stock certificates as collateral for a loan to a business acquaintance. According to Peroff, he endorsed the certificates in blank when the loan was repaid and returned them to the one who actually initiated the fraud. It may be that on the full trial Peroff may be able

to submit substantial proof that another rather than he was the perpetrator of the fraud, but that is a matter for exploration during the trial in Sweden and not for extensive evidentiary inquiry during the extradition hearing. Clearly, the extradition hearing established probable cause to believe that an offense was committed, that Sweden has a substantial basis for proceeding against Peroff and beyond question it is Peroff whom Sweden seeks for trial.

As a result of earlier proceedings growing out of the importation of narcotics into the United States, the Department of Justice and Peroff entered into a witness protection agreement, and Peroff claims that this agreement bars his extradition to Sweden. If such an agreement could ever justify non-compliance with solemn treaty obligations, however, this one does not. It was designed to give Peroff protection from underworld assassins and not to protect him from otherwise legal and proper prosecutorial measures. He remains answerable to charges properly brought against him in Sweden, and the district judge properly found no bar in the witness protection agreement to his extradition.

Finally, Peroff complains that he was not permitted to introduce testimony about the protective agreement and the physical risks he would encounter if actually delivered to the custody of Swedish authorities and transported to Sweden. The protective agreement, however, is simply irrelevant to the question before the court. If there are potential assassins in Swedish prisons, it is for Sweden to take measures adequate to secure Peroff's safety and protection. There is no reason to suppose that Sweden cannot do whatever is required to assure Peroff's safety. A denial of extradition by the Executive may be appropriate when strong humanitarian grounds are pres-

ent, but such grounds exist only when it appears that, if extradited, the individual will be persecuted, not prosecuted, or subjected to grave injustice. Such a reason is not present here. There is no basis for suspecting Sweden's criminal processes, or supposing that Sweden cannot or will not adequately provide for Peroff's protection from criminal elements who may have grievances against him.

The denial of the petition for a writ of habeas corpus is affirmed.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

CIVIL ACTION
NO. 76-204-AM

FRANKLYN PEROFF

v.

I. G. HYLTON,
UNITED STATES MARSHAL

and

EDWARD LEVI,
ATTORNEY GENERAL OF THE UNITED STATES

and

HENRY KISSINGER,
SECRETARY OF STATE

ORDER

This matter having been previously stayed by Order of Judge Bryan entered on March 17, 1976, came on this day to be heard on the Petition for Habeas Corpus. Additionally, the Court heard argument from Mr. Peroff's counsel for a further stay, which the Court takes to have been largely directed to an attempt to secure a continuance of the hearing on the Petition for the Writ of Habeas Corpus from today.

The Court, in the exercise of its discretion and for good cause shown, denied any further continuance or stay in these proceedings.

It is the Court's conclusion of law that the Petition for Writ of Habeas Corpus is governed by *Fernandez v.*

Phillips, 268 U.S. 311, 312, 45 S.Ct. 541, 542, 69 L. Ed. 970 (1925) and by *United States Ex Rel. Sakaguchi v. Kaulukukui,* 520 F.2d 726 (1975) and that this Court, under the habeas corpus petition, can only inquire whether in the original hearing it had jurisdiction, whether the offense charged is within the treaty, and whether there was any competent evidence warranting the finding that there was probable cause to believe that the accused committed the crime charged. Argument of Mr. Peroff's counsel and the evidence presented by Mr. Peroff did not address the issues raised in the Petition for Writ of Habeas Corpus nor did they address the restricted issues permitted by *Fernandez, supra.* The argument, rather, was for a stay to permit at a later hearing the submission of further evidence going (1) to the merits of the case, and (2) to the safety of Mr. Peroff as affected by various locations that he could be held in custody by United States authorities and his safety if turned over to Swedish authorities.

The Court was of the opinion and so held, for the reasons stated in open court, which by reference are incorporated in this Order, that the evidence which the defendant seeks to present, if the Court agreed to a further delay, should have been presented at the hearing on February 23, 1976, or on this date. The Court notes that no motion for delay in order to secure the attendance of witnesses was made by the defendant before or at the hearing of February 23, 1976. The Court is further of the opinion and so holds, that the safety of Mr. Peroff is a responsibility of the Executive Branch of the United States Government and this Court has no authority, except in isolated instances not applicable here, to dictate to the Executive Branch the location at which a Federal prisoner should be held. The Court is further of the opinion that it is the responsibility of the

Secretary of State (through diplomatic channels), and not this Court, to assure the safety of American citizens released to foreigh countries pursuant to extradition proceedings. Furthermore, there has been no evidence presented that Mr. Peroff would be in any danger while in the hands of the Swedish authorities as has been argued by his counsel.

For the foregoing reasons, the Petition for Habeas Corpus is DENIED and the Stay Order entered by this Court on March 17, 1976, is VACATED.

The Clerk is directed to send a copy of this Order to Philip J. Hirschkop, Esquire; to Murray R. Stein, Esquire, Department of Justice; to I. G. Hylton, United States Marshall; The Honorable Henry Kissinger, Secretary of State; and to The Honorable Edward Levi, Attorney General of the United States.

/s/J. Calvitt Clarke, Jr.
United States District Judge

March 22, 1976
Alexandria, Virginia

[SEAL]